No. 86-177

In The
Supreme Court of the United States
October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

I. Whether Section 371, which criminalizes conspiracies "to defraud the United States," "plainly and unmistakably" extends to a conspiracy to defraud a private corporation which is neither an agency nor representative of the federal government and which has no relation to the federal government except that it is a recipient of a federally guaranteed loan.

II. Whether sworn evidence that jurors in a complex criminal case consumed drugs and quantities of alcohol throughout the proceeding, rendering them unable to review the facts, requires an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Eleventh Circuit.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet.App.3-22)[1] is reported at *United*

[1] (Pet.App.—) refers to the appendix to the petition for writ of certiorari; (J.A.—) refers to the Joint Appendix; (R.—) refers to the pleadings contained in the Record on Appeal; and (V.—) refers to the trial transcript. Where volume numbers for the trial transcript are available, they are indicated after the "V," followed by a colon and page number (e.g., V.2:67). Where the trial transcripts are identified by the day of the trial only, the appropriate date is indicated after the "V," followed by a colon and page number (e.g., V.2/22:67). (GX—), (CDX—) and (TDX—) refer to the government's exhibits, petitioner Conover's exhibits and petitioner Tanner's exhibits, respectively.

States v. Conover, 772 F.2d 765 (11th Cir.1985). The court of appeals' order denying rehearing and rehearing *en banc* (Pet.App.1-2) is reported at 795 F.2d 89 (11th Cir.1986). The final judgment of the trial court (J.A.183,185) was not printed in an official reporter.

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JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 26, 1986 (Pet.App.1-2). A petition for writ of certiorari was filed on August 2, 1986, and was granted on November 3, 1986. The jurisdiction of this Court rests on 28 U.S.C.§ 1254(1) (1982).

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CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . ."

18 U.S.C.§ 371 (1982)—Conspiracy to Commit Offense or To Defraud United States:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Fed.R.Evid.606—*Competency of Juror as Witness:*

> "(b) Inquiry into validity of verdict or indictment.
>
> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

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STATEMENT

Anthony R. Tanner, a private contractor, and William M. Conover, the former Manager of Procurement of Seminole Electric Cooperative, Inc. ("Seminole"), a private Florida corporation, were convicted of conspiring to "de-

fraud the United States" by impeding the "functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program." (J.A. 5).[2] They appealed, contending that the expansion of the federal conspiracy statute to a case in which the federal government was neither defrauded of any funds or property nor was there any interference with government officials or their agents performing a governmental function, deprived them of due process and would make a federal crime of any dishonest act between private parties where the defrauded party had any relationship with the federal government, no matter how slight. Further, petitioners contended that an affidavit which demonstrated that the jurors consumed drugs and quantities of alcohol throughout the course of the trial which rendered them unable to review the facts at the very least required an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence. The court of appeals affirmed, holding that petitioners' conduct "constituted a fraud on the United States," despite a total absence of evidence of pecuniary loss to the government or of conspiracy to influence or interfere with any governmental function (Pet.App.12-13), and that because there was no allegation of "outside influence" under Fed.R.Evid.606(b), "the district court was under no duty to investigate the allegations" concerning the use of drugs and alcohol by jurors during the proceedings. (Pet.App.10).

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2 Petitioners were also convicted of several counts under the mail fraud statute, 18 U.S.C.§ 1341 (1982), arising out of the same transaction.

1. Seminole is a private Florida corporation created under Chapter 425 of the Florida Statutes, entitled "Rural Electric Cooperatives," to generate and transmit electrical energy to the eleven rural electric distribution cooperatives which own and operate Seminole. In 1979, Seminole made application with the Rural Electrification Administration ("REA"), an agency of the United States Department of Agriculture, to borrow $1.1 billion through the Federal Financing Bank, an agency of the United States Treasury, to construct a coal-fired generating plant near Palatka, Florida. Application was made through the Federal Financing Bank rather than a private lending institution because it offered the lowest interest rate. (V.2:57). REA approved Seminole's application and guaranteed the loan, which was secured by a promissory note and mortgage from Seminole of Seminole's plants, transmission lines and related facilities. (GX 1-H; V.2:55-57). Construction of the power plant began in September 1979. In order to install a transmission line from the plant to a substation located outside of Ocala, Florida, it was necessary to build a patrol road to allow access to the line by heavy trucks and construction equipment and for maintenance over an estimated thirty to forty years. (V:3:19-21, 71).

The road construction contract was originally awarded to Journagan Construction Company, but soon after construction began, it became apparent that the locally available sand material utilized by Journagan would not compact sufficiently to support even lightweight vehicles. As a result, a soil engineer was brought in to conduct soil tests and make recommendations as to the stabilization of the road. (V.5:139-41). He recommended that Seminole use a two-step process, using sand as the fill material and then

topping the sand off with a clay/sand mixture which was more cohesive and, therefore, more stable. (V.5:139-41). Journagan was unable to obtain sufficient clay/sand material (V.3:92-93), and because of the time required to utilize this two-step process, it was not able to meet the construction schedule.

A meeting was held at Seminole's office in March 1981 to discuss the need to obtain sufficient materials to complete the project on schedule. (V.2/16:11-13). Since beginning construction in late 1980, Journagan had completed only 3.5 of the 51 miles of patrol road and completion of the transmission line was scheduled for March 1982. (V.3:46; V.8:50). Journagan's proposal that it be paid an additional $4.5 million to complete the road was rejected by Seminole which instructed its employee, Conover, as Director of Procurement, to locate a new source of material and secure that material for Seminole. (V.2/29:25-26; V.2/16:14).

Following the meeting, Conover called on Tanner, a friend of his, who was involved in real estate development and owned a limerock mine. They discussed using limerock and limerock overburden as an alternative fill material. (V.4:109). That material was inspected and approved by Seminole's Engineering Manager, and Tanner began supplying materials under a purchase order on an interim basis so that road building could continue while bids were solicited for the remainder of the job. (V.2/16:18-19). In less than one and a half months, using limerock overburden supplied by Tanner, more than five additional miles of road were constructed. (V.13:165, 170-71).

Because Seminole's internal policy required all contracts in excess of $200,000 to be let for bid, Seminole's Engineering Manager was instructed to develop bid specifications for the fill materials contract which would describe the material Seminole was receiving under the purchase order from Tanner, in order to avoid the problems with inadequate material it had experienced in the past. (V.8:17-18, 51; V.2/16:20). These specifications precluded the use of the clay/sand process recommended by the soil engineer and gave Tanner, who had an undeveloped limerock mine relatively close by, an advantage over the other bidders. Tanner submitted the lowest bid for the fill contract and, in addition, submitted the lowest bid on a separate spreading contract. (V.4:16-20).

Although the indictment charged that

> "the Rural Electrification Administration required borrowers participating in its guaranteed loan program to comply with its rules and regulations applicable to the procurement of material, equipment and services to be used in the construction of electrical plants and transmission lines," (J.A.3),

there was no evidence that REA approval of the contracts awarded Tanner was required, and petitioners offered evidence (excluded by the judge) that such approval was *not* required.[3] The patrol road completed by Tanner in October

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[3] The trial judge excluded the letter dated July 24, 1981, from the Director of Power Supply Division of REA to the Manager of Seminole, upon the ground that the question of whether the federal government had been defrauded was a "jurisdictional" question for the court, rather than an issue for the jury. (V.2/28:34-36, V.8:132-37). That letter stated in part:

> "Under the terms of the REA-Seminole loan contract and implementing REA regulations, Seminole was not required to obtain specific REA approval of either the limerock contract dated November 13, 1980, with Citra Mining, Inc.,

(Continued on following page)

1981 was satisfactory for its intended purpose (V.4:139-47; CDX 26 for id.)[4] and was less costly than the clay/sand mixture the government argued should have been used. (*See* GX3I; V.14:153-54, 169-71; V.3:107; V.2/16:70).

Prior to the completion of the road, one of the member cooperatives initiated an investigation which resulted in the suspension of Conover for violating Seminole's conflict of interest policies when it was shown that Tanner and Conover had extensive business and personal dealings before and after the award of the contracts, including fishing trips to the Bahamas together, a contract by Conover to buy a condominium from Tanner, and landscaping work by Conover for Tanner on an apartment project. (V.4: 100-02; V.12:8-9; V.4:86, 97-98.)

Rejecting petitioners' contention that the indictment failed to charge and the evidence failed to establish a conspiracy to "defraud the United States," the majority of the court of appeals deemed the indictment sufficient to charge a crime under Section 371, asserting that the interest of the United States "'extends to seeing that the

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> or the fill dirt contract dated May 14, 1981, with Citrus Sand and Clay, Inc. [Tanner's companies]. *While REA did receive copies of the contracts and did provide Seminole with comments on the contracts, neither the contracts nor the bidding procedure used in either case required REA approval.*" (J.A.52) (emphasis added).

[4] The trial judge acknowledged that limestone produced a superior road (V.13:13-14), and as a result, excluded a substantial amount of evidence as to the suitability and quality of the patrol road, stating the issue was *not* the quality of the road built by Tanner, but "whether there was sufficient sand/clay in Putnam County." (V.13:13).

entire [Seminole] project is administered honestly and efficiently and without corruption and waste.'" (Pet.App. 12-13) (citation omitted). In a special concurring opinion as to this issue, Circuit Judge Hill stated:

> "Section 371 criminalizes conspiracies 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. *In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States.*"
>
> "... No Supreme Court decision has upheld a conviction under section 371 ... where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government."
>
> ....
>
> "... [I]n section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs and entities. Because it has not done so here, *section 371 should not be construed to reach appellants' acts.*" (Pet.App.17-18, 21-22) (emphasis added) (footnote omitted).

2. Following the verdict in the second trial (the first trial ended in a hung jury after six weeks), defense trial counsel received a telephone call from a juror stating that several jurors had consumed alcoholic beverages during luncheon recesses and had consequently fallen asleep dur-

ing the afternoon trial sessions. At the conclusion of a hearing to consider legal arguments as to whether affidavits concerning the telephone call required an evidentiary hearing, Judge Krentzman ruled that an evidentiary hearing would *not* be held:

> "[T]here is no admissible evidence which could be or can be obtained from any member of the jury who served in this case. And therefore, I am not going to order or allow an evidentiary hearing of or from the jurors." (V.19:62).

While the appeal was pending, defense counsel received an unsolicited visit at his home from yet another juror who stated that he had been struggling with his conscience for months and felt the defendants should have an opportunity to be judged by jurors who "would review the facts right" (Pet.App.47), rather than by people who felt as though they were "on one big party" (Pet.App.26) and had "no business being on the jury." (Pet.App.47). He confirmed in a sworn statement (Pet.App.23-56) that many of the jurors were consuming large quantities of alcohol each day during the luncheon recess (a liter of wine by the foreperson, one or two mixed drinks each by two other female jurors, and a pitcher of beer each by the male jurors), and stated in addition, that the four male jurors smoked marijuana daily during the lunch recess. Further, two of the jurors were ingesting "a couple of lines" of cocaine at the city parking garage during the lunch breaks. (Pet.App.42, 44). One juror sold a quarter pound of marijuana to another juror during the trial (Pet. App.51), and one took marijuana, cocaine and drug paraphernalia into the United States District Courthouse and came out of the jurors' restroom "sniffing" "like he got

a cold." (Pet.App.51). The juror concluded that the use of these intoxicants and narcotics caused the jurors using them to be "messed up," "stutter a . . . bit," and to be "falling asleep all the time during the trial" (Pet.App.45-46), which prevented the jury from reviewing the facts in this complex case so as to afford the defendants a fair trial. (Pet.App.47).

Despite this sworn evidence of jury misconduct, the district judge again refused to hold an evidentiary hearing (J.A.255) and the court of appeals affirmed, holding that the use of alcohol and narcotics by jurors did not constitute an "outside influence." under Fed.R.Evid.606(b) and, therefore, that "the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary hearing." (Pet.App. 10).

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SUMMARY OF ARGUMENT

1. Section 371 criminalizes conspiracies "to defraud the United States." The opinion of the court of appeals extends the reach of Section 371 to a conspiracy involving allegations that a *private contractor* defrauded a *private corporation* without any proof of a conspiracy to defraud the government of the United States. Indeed, the evidence was that petitioners neither defrauded the federal government of its funds or property nor interfered with government officials or their agents performing an official government function.

Seminole, the defrauded private corporation, is neither an agency of the federal government nor its represen-

tative performing an authorized governmental function. Granted, it received a loan from a federal agency which was guaranteed by REA, but this is its only connection to the government. While it is irrefutable that the federal government has an interest in seeing that projects receiving funds guaranteed by it are administered honestly and efficiently and without corruption and waste and, for purposes of this appeal, it is conceded that petitioners engaged in collusive and dishonest business practices, a reading of Section 371 that would make the conduct here a crime *against the United States* imposes an obligation to deal honestly with government that is too broad to be understood by "men of common intelligence." *Connally v. General Construction Co.*, 269 U.S.385, 391 (1926). The court of appeals' opinion ignores the limitations previously imposed by this Court on the reach of Section 371 and would make a federal crime of any wasteful, corrupt, or dishonest act between private parties where there is *any* federal government involvement with the defrauded party, no matter how slight, and where the government involvement is irrelevant to the wrongful act and the government suffers no loss.

There is no indication that Congress intended such a broad reading of the conspiracy statute and this Court has not yet approved such an expansive interpretation. As stated by Judge Hill in his special concurrence below, "in the absence of compelling evidence" that a private defrauded party was acting as an agent of the United States performing an authorized function of the federal government, Section 371 should not be read to prohibit wrongful conduct against such "a non-federal entity receiving some form of federal assistance." (Pet.App.19).

The language of Section 371 does not "plainly and unmistakably" cover the petitioners' conduct and the scant legislative history of the statute argues for a limited, rather than expansive, interpretation. Moreover, to the extent that the statute is ambiguous, the *rule of lenity*, which requires a narrow interpretation of criminal statutes, is appropriately invoked to bar the Section 371 prosecution here. *E.g., Williams v. United States*, 458 U.S.279 (1982). Finally, concern for the principle of *federalism* also counsels that this Section 371 prosecution, which attempts to bootstrap a "garden variety" state law crime into a federal crime, should not be allowed. *United States v. Bass*, 404 U.S.336 (1971).

If this Court follows the court of appeals' unwarranted extension of Section 371 to these facts, it would extend the statute beyond the boundaries which have been set by Congress and previous decisions of this Court, would force the federal courts into capricious judicial line drawing and would break free the statute from any restrictions other than the federal prosecutors' unbridled discretion.

2. Despite sworn evidence that jurors in a complex conspiracy case were dealing in and smoking marijuana, ingesting cocaine in the jury room, and regularly consuming alcohol in such quantites as to render them unable to conscientiously "review the facts," the court of appeals held that the district court did not abuse its discretion in refusing to conduct an evidentiary hearing, because Fed.R.Evid. 606(b) limits inquiry of jurors to a determination of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any "outside influence" was improperly brought to bear upon any juror.

This holding overlooks petitioners' right under the sixth amendment to a trial before an impartial and *compe-*

tent jury "capable and willing to decide the case solely on the evidence before it . . . . " *Smith v. Phillips*, 455 U.S.209, 217 (1982); erroneously construes Rule 606(b) as precluding testimony of juror intoxication; and ignores the procedures adopted by this Court to evaluate a *prima facie* showing of jury misconduct:

> "This Court has long held that the remedy for allegations of juror partiality is a *hearing in which the defendant has the opportunity to prove actual bias.*" *Id.* at 215 (citing *Remmer v. United States*, 347 U.S. 227 (1954)) (emphasis added).

ARGUMENT

I

SECTION 371, WHICH CRIMINALIZES CONSPIRACIES "TO DEFRAUD THE UNITED STATES," DOES NOT "PLAINLY AND UNMISTAKABLY" EXTEND TO A CONSPIRACY TO DEFRAUD A PRIVATE CORPORATION WHICH IS NEITHER AN AGENCY NOR REPRESENTATIVE OF THE FEDERAL GOVERNMENT AND WHICH HAS NO RELATION TO THE FEDERAL GOVERNMENT EXCEPT THAT IT IS A RECIPIENT OF A FEDERALLY GUARANTEED LOAN.

The government's theory of "conspiracy to defraud the United States," which was sanctioned by the court of appeals, so blurs the line between what is permitted under Section 371 and what is not as to make the distinction meaningless. By expanding Section 371 completely out of the bounds in which Congress placed it, the court of appeals has potentially placed the federal government, its police and

prosecutors, into virtually every transaction between private entities. If this conclusion is allowed to stand, then "conspiracy to defraud the United States" will remain an unknown and unknowable crime, defined only by the facts in each case and the unchecked discretion of federal prosecutors. Due process demands more precision in a civilized criminal justice system. *See McNabb v. United States*, 318 U.S.332, 340 (1943).

The court below rejected petitioners' contention that a conviction under Section 371 required proof of interference with a lawful government function, violation of a federal statute or regulation, or pecuniary loss to the government. The test applied by the court of appeals was simply that Section 371 is designed to protect the integrity of the United States, its agencies, programs and policies. (Pet.App.12). What the court below ignored in its rush to rationalize a conviction under such a theory are the constitutional impediments to judicial expansion of a criminal statute. "Federal crimes . . . 'are solely creatures of statute,' " and when this Court assesses the reach of a federal criminal statute "a 'narrow interpretation' [is] appropriate." *Dowling v. United States*, 105 S.Ct.3127, 3131-32 (1985) (citations omitted). Thus, a person may not be convicted of a federal crime unless the federal statute " 'plainly and unmistakably' " covers his conduct. *Id.* at 3139 (quoting *United States v. Lacher*, 134 U.S.624, 628 (1890)). This is especially true when the charge is conspiracy "because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S.855, 860 (1966).

The fifth amendment to the Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The sixth amendment further affords criminal defendants the right "to be informed of the nature and cause of the accusation" against them. The principles which have developed to insure these constitutional protections include the requirement that an indictment must inform a defendant of the offense charged with sufficient clarity that he will not be misled while preparing his defense. *See Russell v. United States*, 369 U.S.749, 763-65 (1962). The government's prosecution here under Section 371, if allowed to stand, would violate these sacrosanct constitutional protections because the crime charged by the indictment and the proof at trial concerned conduct which is not prohibited by the face of Section 371 and is beyond its scope. The possibility that an agreement is offensive to society is insufficient to bestow federal criminal jurisdiction; rather, the agreement must be proved to be within an area which Congress has specifically controlled. *See United States v. Feola*, 420 U.S.671, 684 (1975); *Hammerschmidt v. United States*, 265 U.S.182, 188 (1924).

A. The Charge Made by the Indictment Was a Conspiracy "to Defraud the United States." Neither the Statute, the Legislative History, Nor the Opinions of This Court Support Prosecution on Such Charge Where the Victim Is a Private Corporation Which Is Neither an Agency of Nor Controlled by the Federal Government.

Petitioners were charged under Section 371 with conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose."[5] However, the evidence did not show any agreement by petitioners to cause the government or any of its agencies a monetary or property loss, to interfere with any lawful function of the government, or to violate any statute or regulation. Moreover, the proof showed that Seminole was not a government agency but, rather, a private corporation in which the government had no proprietary interest. Thus, the government's theory of conspiracy attempts to connect the "conspirators" (petitioners) to the "victim" (the United States) by one slender thread: the REA's guarantee of Seminole's construction loan.[6]

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[5] There are two types of Section 371 conspiracies. "One addresses itself to a conspiracy to commit substantive offenses specified under other statutes; the other to a conspiracy to defraud the United States. [In the latter, the] conspiracy is itself the substantive offense charged in the indictment." *Bridges v. United States*, 346 U.S.209, 229 (1953) (Reed, J., dissenting). The vast majority of prosecutions under Section 371 are for a conspiracy to commit another federal crime. These prosecutions carry with them much less danger that the defendant will be convicted of conduct which is beyond congressional intent because the conspiracy must be linked to a substantive criminal act.

However, in a prosecution for conspiracy "to defraud the United States" the danger of an overreaching prosecution is much greater because of the lack of a substantive "base" for the prosecution as the "conspiracy . . . itself [is] the substantive offense charged." *Id.* Thus, it is even more important in this type of conspiracy case that this Court require strict adherence by the government to the language of the statute, congressional intent and the mandate of the due process clause.

[6] REA acted here merely as a guarantor, with the normal rights of a guarantor to insure that the collateral was secure. Although REA is an agency of the federal government, it does not directly regulate rural utilities such as Seminole. As aptly noted by Judge Hill:

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The court of appeals held this to be sufficient to convict petitioners under Section 371:

> "It is undisputed that the money used to construct the power plant was borrowed from the Federal Financing Bank, which is an agency of the United States Treasury; nor is it disputed that the loan was guaranteed by the REA, which is also an agency of the federal government. The evidence supports the conclusion that Tanner and Conover engaged in collusive and dishonest business practices. This constituted a fraud on the United States under Section 371." (Pet.App.13).

A diligent search of the congressional record reveals no congressional intent to punish conspiracies to defraud purely private entities. Indeed, there is little legislative history concerning Section 371. Section 371, enacted in 1948,[7] was merely a recodification of the conspiracy statute which has remained virtually unchanged since initial passage in 1867. Act of March 2, 1867, ch.169, § 30, 14 Stat. 484.[8] *See United States v. Dege*, 364 U.S.51, 56 (1960)

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> "[U]nder the Rural Electrification Act [under which REA functions] Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise." (Pet.App.21) (Hill, J., specially concurring).

See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S.375, 385 (1983) (Rural Electrification Act does not preempt state regulatory jurisdiction over rural utilities).

7 Act of June 25, 1948, Pub.L.No.772, 62 Stat.701.

8 The 1948 recodification of the conspiracy statute did add the italicized provision: "If two or more persons conspire . . . to defraud the United States, *or any agency thereof* . . . ." 18 U.S.C.§ 371 revisor's note (1982). "[A]gency" is defined as "any department, independent establishment, commission, ad-

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(Warren, C.J., dissenting). The enactment of the original conspiracy statute in 1867 was accompanied by no congressional record or comment about its intended scope. *See* 1 Reports of Committees, 39th Cong., 2d Sess.H.Rep.15 (February 11, 1867); 47 Cong.Globe, 39th Cong., 2d Sess.1920 (1867). *See also United States v. Allen*, 24 Fed.Cas.772 (C.C.E.D.N.Y.1868)(No.14,432). Some indication, however, that Congress did not intend a broad reading of the statute is found from the fact that it was first passed as part of a law " 'relating to Internal Revenue,' " to combat tax violations. *See United States v. Gradwell*, 243 U.S.476, 481 (1916); Goldstein, *Conspiracy to Defraud the United States*, 68 YaleL.J.405, 417-20 (1959).[9] Indeed, an early decision of this Court required a direct, almost physical relationship between the conspirators and the goverment they sought to defraud. *United States v. Hirsch*, 100 U.S.33, 35 (1879) ("The conspiracy here described is a conspiracy to commit any offense against the United States. The

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ministration, authority, board or bureau of the United States *or any corporation in which the United States has a proprietary interest.*" 18 U.S.C.§ 6 (1982) (emphasis added). There, of course, was no proof here that the government had any proprietary interest in Seminole, a private corporation. *Cf. United States v. Walter*, 263 U.S.15 (1923) (government owned 100% of stock of defrauded corporation).

9 According to Professor Goldstein,

> "not a single explanatory reference to [the conspiracy statute] appears in the entire body of [congressional] hearings and reports. All that can be said with certainty about [the conspiracy statute] . . . is that it was enacted at a time and in a setting which strongly suggest that it was aimed at conspiracies either to commit offenses against the internal revenue or to defraud the United States of internal revenue." Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J.405, 418 (1959) (footnote omitted).

fraud mentioned is any fraud against them. *It may be against the coin, or consist in cheating the government of its land or other property.*") (emphasis added.) Thus, what scant information exists concerning Congress' intent in enacting the conspiracy statute, now Section 371, argues for a limited, rather than expansive, reading of the statute.

In his special concurrence below, Judge Hill correctly pointed out that in a Section 371 prosecution, the government "need not show any monetary or property loss to the federal government to sustain a conviction for conspiracy to defraud the United States;" it is sufficient for the government to prove " 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.' " (Pet.App.17) (Hill, J., specially concurring) (quoting *Dennis v. United States*, 384 U.S.855, 861 (1966)). However, in deciding that a Section 371 prosecution should *not* lie in this case, Judge Hill said:

> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government." (Pet.App.17-18).

Judge Hill is correct. This Court has recognized limits to the conspiracy statute and has not hesitated to hold the government within those limits. Thus, in *United States v. Gradwell*, 243 U.S.476 (1916), this Court sustained a demurrer to an indictment under the predecessor to Section 371, which charged the petitioners with conspiring to defraud the United States by bribing voters. The Court noted that the conspiracy statute was first enacted as part of a law " 'relating to Internal Revenue' " and that

its extension to cover elections "was not intended by Congress." *Id.* at 481. The Court also found that state law was sufficient to protect the electoral process and held:

> "When to all this we add that there are no common-law offenses against the United States . . . , that before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute . . . , we cannot doubt that the District Court was right in holding that the section was never intended to apply to elections . . . ." *Id.* at 485 (citations omitted).

Similarly, in *Hammerschmidt v. United States*, 265 U.S.182 (1924), this Court reversed the court of appeals, which had refused to sustain a demurrer to an indictment which alleged a conspiracy to defraud the United States by interfering with the military draft. The Court noted that it was not necessary that the government prove pecuniary loss by fraud but only that its legitimate official action and purpose be defeated by fraud. *Id.* at 188. Nevertheless, the Court held that not all crimes come within the definition of the words "to defraud" and that "mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" was not a conspiracy "to defraud the United States." *Id.* at 189.[10]

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[10] To support its affirmance of the Section 371 prosecution here, the court of appeals cited *Hammerschmidt's* statement that a conspiracy to defraud the United States may be proved by evidence of interference with the government's " 'legitimate official action and purpose.' " (Pet.App.11-12) (quoting *Hammerschmidt v. United States*, 265 U.S.182, 188 (1924)). However, as just described, *Hammerschmidt limited* the reach of Section 371 by holding that the indictment at issue did not charge a "conspiracy to defraud the United States." *Hammerschmidt*, 265 U.S. at 189.

In *Krulewitch v. United States*, 336 U.S.440 (1949), the Court reversed a conspiracy conviction on hearsay grounds. In his concurrence, Justice Jackson characterized the "federal law of conspiracy" as "elastic, sprawling and pervasive":

> "Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself . . . *suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.*
>
> "The modern crime of conspiracy is so vague that it almost defies definition." *Id.* at 445-46 (Jackson, J., concurring) (emphasis added).

See Grunewald v. United States, 353 U.S.391, 404 (1957) ("*Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.*") (footnote omitted) (emphasis added).

Cases from this Court upholding Section 371 prosecutions have done so when the conspiracy to defraud involved direct pecuniary loss to the government or interference with governmental functions; no decision of the Court has upheld a Section 371 prosecution when the conspiracy's relationship to the government was as attenuated as here. *E.g., United States v. Johnson*, 383 U.S.169 (1966) (conspiracy to exert influence on the Department of Justice to obtain dismissal of pending indictments); *Glasser v. United States*, 315 U.S.60 (1942) (conspiracy between assistant United States Attorney and private attorney to fix federal cases); *United States v. Kapp*, 302 U.S.214

(1937) (conspiracy to furnish false information to the Secretary of Agriculture to secure benefit payments under the Agricultural Adjustment Act); *United States v. Walter*, 263 U.S.15, 16 (1923) (conspiracy to make fraudulent claim against a corporation "of which the United States owned all the stock"); *Haas v. Henkel*, 216 U.S.462 (1909) (conspiracy to defraud Department of Agriculture by secretly obtaining from the Department advance copies of crop reports).

This Court's most recent interpretation of a Section 371 "conspiracy to defraud the United States" came in *Dennis v. United States*, 384 U.S.855 (1966), which held that the indictment, alleging that the defendants conspired to obtain the services of the National Labor Relations Board by filing false "non-communist" affidavits, properly charged a Section 371 conspiracy. However, this Court in *Dennis* admonished that

> "indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Id.* at 860 (citations omitted).

None of these cases supports a Section 371 prosecution when the victim of the conspiracy is a private corporation which is connected to the federal government only by its receipt of a federally guaranteed loan. Indeed, the "interference" or "obstruction" of government functions which are properly punished by Section 371 involve cases in which the defendants have made false statements or claims to a governmental agency, have bribed or colluded with government officials, or have violated obligations im-

posed by federal statute or regulation, either criminal or non-criminal. *E.g., Glasser v. United States,* 315 U.S.60 (1942); *Hammerschmidt v. United States,* 265 U.S.182, 188 (1924). Such is not the case here. The only way that the court of appeals was able to uphold petitioners' convictions under Section 371 was to interpret the phrase "conspiracy to defraud the United States" so that it has no meaning to "men of common intelligence." *Connally v. General Construction Co.,* 269 U.S.385, 391 (1926). *See* Goldstein, *Conspiracy to Defraud the United States,* 68 Yale L.J.405, 455 (1959) (such a reading of Section 371 "imposes an obligation to deal with government [that] is too broad to be understood either by reasonable men or unreasonable public officials").

Indeed, the conduct charged here had *no* direct relationship to the United States, its agencies or lawful functions, and the court of appeals' sanctioning of a Section 371 conviction on these facts does violence to the due process clause of the fifth amendment and the sixth amendment's right "to be informed of the nature and cause of the accusation." The court of appeals' decision also negates a fundamental tenet of criminal law: that no one be punished for conduct which has not been legislatively defined and classed as a crime in advance of its commission. *See, e.g., Lambert v. California,* 355 U.S.225, 228-29 (1957); *Screws v. United States,* 325 U.S.91, 101-02 (1945).

Neither can, as the court of appeals suggests, this Section 371 prosecution be justified because of the government's interest in seeing that " 'the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste.' " (Pet.App.12-13) (citation omitted). For as Judge Hill states: "[I]n section 371

Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective . . . . " (Pet.App.21) (Hill, J., specially concurring). Thus, expansion of Section 371 to include conspiracies to defraud a private entity receiving a federal loan which entails only a "modicum of federal supervision" of that loan is "patently insufficient to render a fraud upon that [private] entity a fraud upon the United States." *Id.* at 20. *Accord United States v. Porter,* 591 F.2d 1048, 1055 (5th Cir.1979).

B. The Principles of Lenity and Federalism Dictate That a Section 371 Prosecution Cannot Lie in These Circumstances.

In determining the reach of Section 371, this Court should first look to the language of the statute itself. *Perrin v. United States,* 444 U.S.37, 42 (1979). Section 371 punishes a conspiracy to defraud "the United States or any agency thereof in any manner or for any purpose." On its face, the statute does not reach a conspiracy to defraud a private corporation with only tangential connections to the government. Moreover, as previously discussed, the scant legislative history at best "does not demand a broader reading of the statute," *Williams v. United States,* 458 U.S. 279, 288 (1982), and at worst is ambiguous because the Court can do "no more than . . . guess as to what Congress intended." *Ladner v. United States,* 358 U.S.169, 178 (1958). And, any uncertainty as to congressional intent brings into play the rule that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity." *Rewis v. United States,* 401 U.S.808, 812 (1971).

In two recent cases with similarities to this one, this Court has invoked the rule of lenity to invalidate federal criminal convictions. In *Williams v. United States,* 458

U.S.279 (1982), the defendant had been convicted of depositing "bad checks" in federally insured banks. Reversing the conviction under 18 U.S.C.§ 1014 (1982), which makes it a crime to render false statements to a federally insured financial institution, the Court held:

> "Given this background—a statute that is not unambiguous in its terms and that if applied here, would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law—*we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes.*" *Id.* at 290 (emphasis added).

Similarly, in *Dowling v. United States,* 105 S.Ct.3127 (1985), this Court held that the National Stolen Property Act did not reach the interstate transportation of "bootleg records:"

> "[T]he Court has stressed repeatedly that ' " ' " 'when choice has to be made between two readings of what conduct Congess has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " ' " ' " *Id.* at 3132 (citations omitted).

Because the statute did not " '*plainly and unmistakably*' cover petitioner[s'] . . . conduct" and because "the rationale employed to apply the statute to petitioners' conduct would support its extension to significant bodies of law that *Congress gave no indication it intended to touch,*" the Court utilized the rule of lenity to reverse the conviction. *Id.* at 3139 (citations omitted) (emphasis added).

Nothing in the language or sparse legislative history of Section 371 shows that Congress "plainly and unmistakably" intended the statute to apply to a conspiracy to defraud a private corporation. Thus, the rule of lenity is appropriately invoked to bar the Section 371 prosecution here. *See also Liparota v. United States,* 471 U.S. 419 (1985); *United States v. Bass,* 404 U.S.336 (1971).

Closely allied with the rule of lenity is the principle of *federalism* which, as applied here, holds that:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . . In the instant case, *the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources.*" *United States v. Bass,* 404 U.S.336, 349-50 (1971) (footnotes omitted) (emphasis added).

Here, the conduct charged by the government is no more than a violation of a private corporation's internal conflict of interest policies or, at most, a conspiracy to defraud a private corporation. These are matters traditionally left to state criminal law and, indeed, Florida's criminal statutes provide several bases for prosecution of the conduct charged here.[11] Absent proof of clear congres-

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[11] *E.g.,* Chapter 812, Florida Statutes, prohibits "[o]btaining property by fraud, willful misrepresentation of a future act, or false promise." Fla.Stat.§ 812.012(2)(c) (1985); Chapter 895, Florida Statutes, the Florida RICO Act, prohibits conspiracies to commit fraud. Fla.Stat.§ 895.02 (1985); Chapter 817, Florida Statutes, entitled "Fraudulent Practices," prohibits all forms of fraud generally; Chapter 777, Florida Statutes, criminalizes conspiracies "to commit any offense . . . ." Fla.Stat.§ 777.04(3) (1985).

sional intent to extend Section 371 into an area traditionally controlled by state criminal law, Section 371 should not be held to so intrude. *See Williams,* 458 U.S. at 287 (1982) ("federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fradulent checking activities already were addressed in comprehensive fashion by state law").

C. The Unwarranted Extension of Section 371 to These Facts Would Not Further the Purpose of the Conspiracy Statute and Would Make All Wrongful Conduct, No Matter How Tangential the Relationship to the Government, a Federal Crime.

With little legislative history, we must look to decisions of this Court to discern the purposes of the conspiracy statute. This Court's decisions reveal three governmental interests which Section 371 is designed to protect: (1) the government's interest in not suffering a monetary loss from fraud; (2) the government's interest in performing its lawful functions without obstruction or interference; and (3) the government's interest in compliance with its statutes and regulations. *See, e.g., Dennis v. United States,* 384 U.S.855 (1966). None of these purposes is served by the extension of Section 371 liability to wrongful conduct against a private entity with tangential connections to the government, where the government suffers no loss.

Indeed, if this Court affirms petitioners' convictions, it will be extending Section 371 to almost limitless boundaries. Lower courts will have no basis to decide when a private entity comes under the purview of Section 371 and when it does not. Taken to its logical extreme, *every*

person who engages in any kind of wrongful conduct against a person or entity receiving government assistance, no matter how indirect, or affected by a government program, no matter how slightly, will be subject to a Section 371 prosecution. A new national, all-inclusive criminal code would have been judically created without legislative input, a function this Court has found itself ill-equipped to perform. *Cf. Garcia v. San Antonio Metro. Transp. Auth.,* 469 U.S.528. 546 (1985); *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S.579 (1952).

For example, under the court of appeals' construction of Section 371, if a seller of a residential house and his broker agreed to misrepresent the condition of the house to a buyer and the buyer takes out an FHA or VA loan to purchase the house, this fraud on the buyer would be a conspiracy "to defraud the United States" because of the FHA's or VA's interest in seeing that transactions which those agencies finance are "honest." This would transform a "garden variety" state law fraud prosecution into a federal crime, without any such direction from Congress. *Cf. Sedima, S.P.R.L. v. Imrex Co.,* 105 S.Ct. 3275 (1985). Given that federal programs and policies affect, to some extent, almost all aspects of our citizens' lives, other such examples of federal prosecutions under a Section 371 without limits are easy to imagine.

This Court has recognized that not all wrongful conduct is a federal crime and that:

> "[U]nder our vaunted legal system, no man, however bad his behaviour, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United*

States, 363 U.S.370, 394 (1960) (invalidating indictment under federal mail fraud statute).

Accord France v. United States, 164 U.S.676, 682 (1897) ("The statute does not cover the transaction, and, however reprehensible the acts . . . may be . . . , we cannot sustain a conviction on that ground."). Thus, even if it is conceded that these petitioners have engaged in a conspiracy to defraud a private corporation, that conduct should not be held to be a federal crime under Section 371.[12]

II.

SWORN EVIDENCE THAT JURORS WERE UNABLE TO COMPREHEND AND REVIEW THE FACTS AS THE RESULT OF CONSUMING DRUGS AND LARGE QUANTITIES OF ALCOHOL THROUGHOUT THE COURSE OF THE TRIAL REQUIRES AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE DEFENDANTS WERE TRIED BY A JURY CAPABLE OF DECIDING THE CASE ON THE EVIDENCE.

Consistent with the sixth amendment's guarantee of the right to trial "by an impartial jury," this Court has repeatedly recognized that the foundation of our system of criminal justice is the right to a trial before "a jury capable and willing to decide the case solely on the evidence before it . . . ." *Smith v. Phillips*, 455 U.S.209, 217

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[12] If the Court reverses the Section 371 conviction, it should also reverse the mail fraud convictions because the mail fraud counts on their face depended upon proof of a conspiracy to defraud the United States. (J.A.12-15). Faced with the identical situation, the Fifth Circuit, in *United States* v. *Porter*, 591 F.2d 1048, 1058 (5th Cir.1979), reversed both the conspiracy and mail fraud convictions.

(1982). *Accord Parker v. Gladden*, 385 U.S.363, 364 (1966); *Turner v. Louisiana*, 379 U.S.466, 472 (1965); *Irvin v. Dowd*, 366 U.S.717, 722 (1961).

In *Smith v. Phillips*, this Court emphasized that where the impartiality of a juror is challenged, the defendant has a right to an evidentiary hearing to determine whether defendant was afforded a fair trial:

> "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 (citing *Remmer v. United States*, 347 U.S.227 (1954)).

Remmer involved an attempt to bribe a juror in a criminal income tax case. A post-trial motion for a new trial and a "request for a hearing to determine the circumstances surrounding the incident and its effect on the jury" were denied by the trial court "without holding the requested hearing . . . ." 347 U.S. at 228-29 (footnote omitted). This Court reversed and ordered a hearing at which the government was given the heavy burden of demonstrating that "such contact with the juror was harmless to the defendant." *Id.* at 229. As later summarized in *Smith v. Phillips:*

> "[This] Court [in *Remmer*] instructed the trial judge to 'determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate.'" 455 U.S. at 216 (quoting *Remmer*, 347 U.S. at 230) (emphasis in original).

The purpose and importance of a post-trial hearing to investigate an allegation of juror misconduct were emphasized in the concurring opinion in *Smith v. Phillips:*

> "A [post-trial] hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." 455 U.S. at 222 (O'Connor, J., concurring).

Here, there was sworn evidence that jurors were not able to comprehend and review the facts because of their inebriated condition due to the use of drugs and excessive amounts of alcohol. Nevertheless, the trial judge refused to hold the requested hearing and the court of appeals declined to order one.

The reliance by the court of appeals on the trial court's exercise of "sound discretion" in refusing to hold a hearing is misplaced. Here, the district judge had no opportunity to observe the juror's recitation of what happened during the course of the proceedings, but simply ruled, as a matter of law, that the affidavit on its face was insufficient to require an evidentiary hearing. However, as noted by Justice Cardoza, all that is required to penetrate the privilege of secrecy accorded the conduct of jurors is a *prima facie* showing that misconduct in fact occurred:

> "To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.' When that evidence is supplied, the seal of secrecy is broken." *Clark v. United States*, 289 U.S.1, 15 (1933) (citation omitted).

Cf. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S.548, 557-59 (1984) (Brennan, J., concurring). Certainly, the sworn evidence presented here was sufficient to make a *prima facie* showing so as to require a hearing.

This and other courts have recognized the right to a mentally competent jury. *See, e.g., Jordan v. Massachusetts*, 225 U.S.167 (1912); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir.1980) (trial before jury with an insane juror inconsistent with due process). However, the court of appeals' opinion would limit the scope of the sixth amendment's protection to instances involving "'extraneous prejudicial information'" or "'outside influence'" (Pet.App.10)(quoting Fed.R.Evid.606(b)). Under this rationale, if a party discovered after the verdict that a number of the jurors were incompetent or deaf, no evidentiary hearing would be required to determine whether such infirmity rendered them incapable of comprehending the evidence and rendering an impartial verdict because those impairments do not involve "extraneous prejudicial information" or "outside influence." Here, a sworn statement demonstrates that the jurors, by their excessive use of intoxicants and narcotics, were "flying," "messed up," "falling asleep," and clearly unable to comprehend and review the facts in this complex criminal case. (Pet.App. 45-46). To hold that such evidence does not require an evidentiary hearing, much less a new trial, ignores this Court's consistent commitment to the sixth amendment's guarantee of a fair hearing by a panel of impartial jurors "capable and willing to decide the case on the evidence." *Smith v. Phillips*, 455 U.S. at 217.

Moreover, the court of appeals' opinion, which holds that substance abuse (whether occurring in a restaurant or a parking garage or in the jury room itself), does not constitute an "outside influence" under Fed.R.Evid.606

(b), stands alone and is contrary to every case or treatise that has addressed the issue:[13]

> "Rule 606(b) would not render a witness incompetent to testify to jury irregularities such as intoxication . . . regardless of whether the jury misconduct occurred within or without the jury room." 3 J.Weinstein and M.Berger, Weinstein's Evidence ¶606[04], at 606-29 through 606-32 (1985).

To permit convictions to stand in the face of sworn evidence of such gross misconduct, without an evidentiary hearing, violates the sixth amendment's guarantee to a fair trial before an impartial and *competent* jury.

CONCLUSION

For these reasons, petitioners respectfully request the Court to reverse the decision of the Court of Appeals for the Eleventh Circuit and order the court of appeals to remand this case for entry of a judgment of acquittal. Alternatively, the Court should require the district court

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[13] *See, e.g., United States* v. *Taliaferro*, 558 F.2d 724 (4th Cir.1977), *cert.denied*, 434 U.S.1016 (1978) (evidentiary hearing held to determine whether drinks consumed at dinner affected jurors in the performance of their duties); *Jorgensen* v. *York Ice Machine Corp.*, 160 F.2d 432, 435 (2d Cir.), *cert.denied*, 332 U.S. 764 (1947) (L. Hand, J.) (drunkenness and bribery are matters about which jurors may give testimony after the verdict); *Faith* v. *Neely*, 41 F.R.D. 361, 366 (N.D.W.Va.1966) (affidavit claiming one juror was intoxicated caused court to present questionnaire to each juror to determine whether the "juror's faculties were affected and [whether] he could . . . discharge his duties"); *Gamble* v. *State*, 33 So.471, 473 (Fla.1902); 8 Wigmore *Evidence* § 2354, at 703 (McNaughton rev.1961).

to conduct a *Remmer*-type evidentiary hearing on juror misconduct.

Respectfully submitted,

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